90-329

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BERNARD HARRIS AND ROBERT BOYD, PETITIONERS

VERSUS

TRAYLOR BROS., INC. AND EMPLOYER'S FIRE INS. CO., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a "vessel" under the Jones Act a different issue from the questions of vessel status under Section 905 (b) of the Longshore and Harbor Workers' Compensation Act.

PARTIES

1. Bernard Harris - Petitioner

2. Robert Boyd - Petitioner

3. Traylor Brothers, Inc. - Respondent

4. Employers Fire Ins. Co. - Respondent

5. Denise A. Vinet - Attorney for petitioners

6. Joseph B. Guilbeau - Attorney for Respondent

7. Robert Redwine - Attorney for Respondent

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STATUTES

33 U.S.C. §905(b)

46 U.S.C. §688

Rule 56 of Federal Judicial Procedure and Rules

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1990

Bernard Harris, Robert Boyd, Petitioners

VS.

Traylor Bros., Inc. and Employer's Fire Ins. Co., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Bernard Harris and Robert Boyd, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit affirming the district Court's Motion for Summary Judgment when taking into account that the affidavits filed

by petitioners show that the work barges are "vessels" within the meaning of §905(b) of the LHWCA.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported as Bernard Harris vs. Traylor Bros., Inc. and Employer's Fire Ins. Co., Summary Calendar #89-3365 (5th Cir. 1990) consolidated with Robert Boyd versus Traylor Bros., Inc. and Employer's Fire Ins. Co., Summary Calendar #89-3707 (5th Cir. 1990) and appear in Appendix A to this petition. The unpublished written opinion of the District Court for the Eastern District of Louisiana appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on April 17, 1990. This Court's jurisdiction is invoked under Title 28, U.S.C. § 905(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Jones Act, 46 U.S.C.A. App. § 688

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

STATEMENT OF THE CASE

Bernard Harris and Robert Boyd were employed by Traylor Brothers in the construction of the Gramercy Bridge across the Mississippi River. At the time of the accident that gave rise to their claims Harris was working as a welder and Boyd was working as a crane operator at the Pier #2 location. The center of operations for both was crane barge N-49, a flat deck barge anchored in the Mississippi River approximately 12 feet from the caisson.

Harris and Boyd were injured when they were forced to jump into the Mississippi River as the M/V Cargill struck Pier #2. As a result the caisson filled with water and in turn a huge water surge resulted causing the crane to plunge into the river. They contend that had their employer provided a radio communication system and/or an escape boat they would not have been injured.

Bernard and Harris made claims for negligence, unseaworthiness, and maintenance and cure under the Jones Act, and for vessel negligence under Section 905(b) of the Longshore and Harbor Worker's Compensation Act.

Traylor moved for summary judgment on all claims. The Trial Court and Court of Appeals granted the motions for summary judgments on all claims stating that the barge was not a vessel for purposes of both the Jones Act and a 905(b) claim.

REASONS FOR GRANTING WRIT

Certiorari should be granted when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

The Court of Appeals for the 5th Circuit conflicts with the most recent Louisiana Supreme Court case entitled Chester J.

Orgeron, Jr. and his wife, Connie E. Lynn Camus Orgeron versus Avondale Shipyards, Inc., 556 So.2d 582 (LA. 1990) (Appendix F)

The United States Court of Appeals Court concluded that a vessel under the Jones Act should be treated the same as a vessel under the Longshore and Harbor Workers' Compensation Act §905(b). However, in Orgeron, supra, the Court noted that the Jones Act definition of the word vessel should not be substituted for the word vessel in Section 5(b) of the Longshore and Harbor Workers' Compensation Act.

The Orgeron facts show that Orgeron worked on work platforms which moved men and materials within the work area of the ship in the Harvey Quick Repair Yard. The transportation function was incidental to their primary use. The barges were free floating and were pushed and pulled wherever needed within the job location. The barges carried men wearing life vests as well as

equipment. They were subject to the perils of the sea, sometimes breaking loose from their moorings.

The Court of Appeals used the term vessel synonymous with the Jones Act and the Longshore and Harbor Workers' Compensation Act. The factors used to determine both were:

1. The structures involved were constructed and used primarily as work platforms;

2. they were moored or otherwise secured at the time of the accident; and

3. although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.

The issue of whether the barge performed a transportation function as a primary or incidental matter relates to vessel status under Jones Act. Ducreport vs. Baton Rouge Marine Enterprises, Inc., 877 Fd 2d 393 (5th

Cir. 1989) Ducrepont requires that a structure be sufficiently mobile to serve some transportation function for vessel status under Section 905(b).

Richendollar vs. Diamond M. Drilling, 819 F 2d (5th Cir.) cert. denied 484 U.S. 944, 108 S. Ct. 331, 98 L.Ed 2d 358 (1987) points out that the configuration of a water craft is of secondary importance because size, form, equipment and means of propulsion do not determine jurisdiction.

A conflict exist between the Louisiana State Supreme Court and the United States Federal Court of Appeals. The United States Court of Appeals in the case at hand uses one test to determine both Jones Act vessel status and Longshore and Harbor Workers' Compensation Act 905(b) vessel status.

The test to be used is the capability test which is "every description of water craft or other articial controversy capable

of being used as a means of transportation on water. 1 U.S.C. §3

The Court of Appeal cited Richendollar which decided that a ship being constructed on land was not a vessel within the admiralty jurisdiction because it was not in or on navigable waters and was incapable of flotation. It relied on Bernard vs. Binnings Construction Co., Inc., 741 F 2d 824, to affirm Richendollar, however, it failed to note that the language used was in the analysis of a barge as a Jones Act vessel and not as a Section 905(b) vessel.

As in the Orgeron case, the barge in the case at hand was being used as a work platform by Harris and Boyd and was capable of transportation on water. It was also free floating. In fact, the barge was used to carry men and equipment around the job location and other job locations as cited in the affidavits.

The barge was positioned with four anchors and swayed constantly in the middle of the Mississippi River. These men were in constant fear of being hit by barges and had experienced several near misses prior to the collision. See Appendix G, H, I, J, K, L and M.

A vessel should not be treated as one in the same for Jones Act and 905(b) purposes. Longshoremen do not go out on the high seas as a practical matter.

Summary judgment is appropriate where the only rational inference to be drawn from the evidence is that there is no genuine issue of material fact. Rule 56 of Federal Civil Judicial Procedure and Rules.

A genuine issue of material fact exist taking all affidavits and depositions filed into account. Of utmost importance is the improper test used to decide this case. Harris and Boyd were on barges that meet the capability test. They were subject to the

same perils of the sea of any seamen or other longshoremen.

This Court should grant Certiorari here to explicitly rule that the capability test is the proper burden of proof under 905(b) claims and, further, to resolve the conflict between the 5th Circuit Court of Appeals and the Louisiana Supreme Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals and Louisiana Supreme Court in this matter.

Respectfully submitted,

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

Bernard Harris, Robert Boyd, Petitioners

VS.

Traylor Bros., Inc. and Employer's Fire Ins. Co., Respondents

PROOF OF SERVICE & FILING

I, Denise A. Vinet, do swear or declare that on this date, 8/20, 1990, pursuant to Supreme Court Rules 29.2, 29.3. and 29.4, I have served a corrected copy of the attached Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail

properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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Denise A. Vinet

Sworn to and subscribed before me this 20 day of August, 1990.

Notary Public

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-3365
(Summary Calendar)

In the Matter of the Complaint of CARGILL EQUIPMENT LEASING CORPORATION as Owner, and CARGO CARRIERS, INC. and CARGO EXPORT, INC., as Bareboat Charterers and Owners pro hac vice, of the M/V CARGILL MACMILLAN, Her Engines, etc., for Exoneration from or Limitation of Liability.

BERNARD HARRIS,

Plaintiff-Appellant,

versus

TRAYLOR BROS., INC., and

EMPLOYER'S FIRE INS. CO.,

Defendant-Appellees.

CONSOLIDATED WITH

NO. 89-3707
(Summary Calendar)

In the Matter of the Complaint of CARGILL EQUIPMENT LEASING CORPORATION as Owner, and CARGO CARRIERS, INC. AND CARGO EXPORT, INC., as Bareboat Charterers and Owners pro hac vice, of the M/V CARGILL MACMILLAN, Her Engines, etc., for Exoneration from or Limitation of Liability.

ROBERT BOYD,

Plaintiff-Appellant,

versus

TRAYLOR BROS., INC. and
EMPLOYER'S FIRE INS. CO.,

Defendant-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA-84-5903-L (1), 85-4517, 85-4714, 85-4919,
85-5522, 85-5523, 85-5659, 85-5684, 85-5703,
86-0075, 86-440 and 86-934)

(April 17, 1990)

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:*

Bernard Harris and Robert Boyd appeal adverse summary judgments dismissing their Jones Act and 33 U.S.C. 905(b) claims against Traylor Brothers, Inc., their employer. We consolidated these appeals for disposition and now affirm.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

Harris and Boyd were both employed by Traylor Brothers in the construction of the Gramercy Bridge across the Mississippi River. At the time of the accident that gave rise to their claims Harris was working as a welder on the caisson for bridge Pier No. 2. Boyd was working as a crane operator on the same pier. The center of operations for both was crane barge N-49, a flat deck barge moored 12 feet from the caisson. The N-49 supported the crane Boyd operated as well as a small hut where Traylor employees kept their tools and occasionally ate lunch. Harris and Boyd were transported to and from the barge by crew boat. While Harris would take his coffee breaks on the barge and his lunch breaks on the river bank, the majority of his work time was spent

welding inside the caisson, 90 feet below the surface of the river.

Harris and Boyd complain of a collision that occurred in November 1984 when the M/V CARGILL MACMILLAN struck Pier No. 2. Harris, Boyd, and several others standing on the N-49 at the time were forced to jump into the Mississippi. The collision caused the crane on the N-49 to fall into the river.

Claiming seaman status because of their assignment to the barge Harris and Boyd sued Traylor Brothers for negligence, unseaworthiness, and maintenance and cure under the Jones Act, and for vessel negligence under section 905(b) of the LHWCA. Traylor Brothers moved for summary judgment on the Jones Act claims on the grounds that the N-49 was not a "vessel." In support of its motion Traylor Brothers offered the affidavit of Thomas

Youngblood, its project engineer at the Gramercy site, attesting to the fact that the N-49 was on the site of the Gramercy project continuously from April 1983 to November 1984, the date of the accident. In opposition Harris submitted his affidavit and that of two co-workers, including Boyd, which indicated, in general terms, that some of the barges used on the Gramercy project occasionally had been used at other sites. The district court concluded that the N-49 was not a vessel and dismissed the Jones Act claims of Harris and Boyd.

Subsequently Employers Fire Insurance Company, which defended Traylor Brothers against Harris's section 905(b) claim, moved for summary judgment on the same grounds using the same evidence. Harris submitted a new affidavit by Boyd which stated that some time before the accident the N-49 had been towed to

unload a grain barge. The district court granted Employers' motion and dismissed Harris's maritime claims in their entirety. The court certified its judgments pursuant to Fed.R.Civ.P. 54(b). Harris appealed.[1] Employers then moved for summary judgment against Boyd's section 905(b) claim on the alternative grounds that the claim had been untimely filed and that the N-49 was not a vessel. The district court granted the motion and Boyd timely appealed.[2] We consolidated their appeals.

---

[1] Because no post-judgment motions were filed by Harris, his notice of appeal, filed after the court's decisions on the two summary judgment motions but before entry of the judgment thereon was timely filed. F.R.A.P. 4 (a) (2).

[2] Employers has since conceded that Boyd's section 905(b) claim was timely filed.

Analysis

Harris appeals the dismissal of his Jones Act and LHWCA section 905(b) claims; Boyd appeals the dismissal of his claim under section 905(b). To recover under the Jones Act, a claimant must demonstrate seaman status which requires that:

> (1) he must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.

Bernard v. Binnings Constr. Co., 741 F.2d 824, 827 (5th Cir. 1984) (quoting Barrios v. Engine & Gas Compressor Services, Inc., 669 F.2d 350, 352 (5th Cir. 1982)). Central to recovery under both the Jones Act and the section 905(b) cause of action for vessel negligence is the requirement that the tort occur on a "vessel" for maritime purposes at the time of the

accident. See Richendollar v. Diamond M Drilling Co., 819 F.2d 124 (5th Cir. 1987) (en banc); Bernard 741 F.2d at 828-29. If the N-49 was not a vessel the district court's dismissal of the claims must be affirmed; if it was not, a reversal is in order.

Despite a general reluctance to remove Jones Act cases from the trier of fact, Leonard v. Exxon Corp., 581 F.2d 522 (5th Cir. 1978), cert. denied, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 397 (1979), summary judgment is appropriate "'where the only rational inference to be drawn from the evidence is that the worker is not a seaman.'" Bernard, 741 F.2d at 828 (quoting Beard v. Shell Oil Co., 606 F.2d 515, 517 (5th Cir. 1979)). We have affirmed the entry of summary judgment on various Jones Act and section 905(b) elements, including vessel status. See, e.g., Ducrepont v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393

(5th Cir. 1989); Johnson v. Odeco Oil & Gas Co., 864 F.2d 40 (5th Cir. 1989); Bernard; Stansbury v. Sikorski Aircraft, 681 F.2d 948 (5th Cir.), cert. denied, 459 U.S. 1089, 103 S.Ct. 573, 74 L.Ed.2d 935 (1982).

A number of factors have been found relevant to the determination whether a structure is a vessel: (1) navigational aids; (2) raked bow; (3) lifeboats and other lifesaving equipment; (4) bilge pumps; (5) crew quarters; (6) registration as a vessel with the Coast Guard; (7) intentions of the owner to move the structure on a regular basis; (8) ability of a submerged structure to be refloated despite years of corrosion and deterioration; and (9) length of time a structure has remained stationary. Johnson, 864 F.2d at 43; Hemba v. Freeport McMoran Energy Partners, Ltd., 811 F.2d 276, 278 (5th Cir. 1987). We consistently have held,

however, "'that dry docks and analogous structures whose primary purpose is to provide a work platform, even if the structures are afloat, are no . . . vessels as a matter of law.'" Ducrepont, 877 F.2d at 395 (quoting Bernard, 741 F.2d at 830)). As developed in the jurisprudence, three factors are perceived as common to floating platforms that do not constitute vessels for purposes of the Jones Act and section 905(b):

> (1) [T]he structures involved were constructed and used primarily as work platforms;
>
> (2) they were moored or otherwise secured at the time of the accident; and
>
> (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.

Bernard, 741 F.2d at 831.

Applying the three Bernard factors to the evidence in the summary judgment record, the

district court determined that the N-49 was not a vessel. We agree. The record clearly reflects that the N-49 was used primarily as a work platform. The affidavits of Harris, Boyd, and Benjamin Williams (another Traylor Brothers employee) established that the N-49 was equipped with a small hut with bathroom facilities where Traylor Brothers employees changed clothes and took their coffee breaks, navigational lights, a raked bow, an injured-man basket, life-saving equipment, and bilge pumps. Despite the presence of navigational lights, however, there was no evidence of navigational equipment; nor was evidence presented to the effect that the N-49 had life boats, crew quarters, or propulsion power. Harris candidly described the N-49 as a flat deck barge that supported a crane, that it was kept in place by four heavy anchors, and that it did not move during his assignment to Pier

No. 2. Further, the N-49 was moored at the time of the accident.

Finally, the summary judgment evidence clearly demonstrates that any movement of the N-49 was merely incidental to its primary purpose of serving as a work platform. Boyd's deposition indicated that the N-49 was not used to carry materials or people to or from the riverbank. This was buttressed by the affidavit of the project engineer, who stated that the N-49 had not been moved since his arrival on the site in April 1983. Boyd's general testimony that barges occasionally were moved to accommodate the varying need for a crane is consistent with the incidental nature of the movement, if any, of the N-49.

This evidence was not contradicted by Boyd's subsequent affidavit in which he described three instances of barge movement. In one, according to Boyd, the N-49 was towed

"before the accident" to unload a grain barge. As the district court properly concluded, this could have occurred well before the Gramercy bridge project began. Similarly, Boyd described "several jobs prior to the accident wherein the crane barge was towed to the location of different contractors along the Mississippi River in order to perform jobs." Boyd's failure to particularize the crane barge involved and the approximate dates of the barge movement does not sufficiently contravene the summary judgment evidence adverse to his and Harris's position so as to create a disputed material fact. Finally, that the N-49 was towed to pick up a new crane after the accident is readily understandable when one recalls that the accident had caused the old crane to topple into the Mississippi River.

Viewing the evidence presented to the district court "through the prism of the

substantive evidentiary burden," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and resolving all reasonable inferences to be drawn therefrom in favor of Harris and Boyd, we find nothing to create a genuine issue as to whether the N-49 was used as anything other than a work platform during the entirety of its presence at the Gramercy bridge project site.[3] Traylor Brothers, Inc. is entitled to judgment as a matter of law.

The judgments of the district court in these consolidated cases are, in all respects, AFFIRMED.

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[3] We express no opinion as to the correctness of the district court's alternative holding that as a worker engaged in bridge construction Harris was not engaged in maritime employment and therefore could not be deemed a longshoreman within the meaning of the LHWCA.

APPENDIX B

MINUTE ENTRY
WICKER, J.
JUNE 1, 1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE COMPLAINT CARGILL LEASING CORPORATION AS OWNER, AND CARGO CARRIERS, A DIVISION OF CARGILL MARINE & TERMINAL, INC., AS BAREBOAT CHARTERERS AND OWNERS PRO HAC VICE OF THE M/V CARGILL MacMILLAN, her engines, etc., FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NUMBER 84-5903 CONSOLIDATED W/ 85-5684, 85-4517, 85-4714, 85-5522, 85-4919, 85-5523, 85-5703, 85-0440, 85-5659, 856-0934, 86-0075 SECTION "L" (1)

These lawsuits arise from a collision on the Mississippi River on November 30, 1984, when the M/V CARGILL MacMILLAN hit Pier No. 2 (a substructure under construction at the Gramercy/Wallace Bridge across the Mississippi River). The collision allegedly demolished th pier, damaged a crane barge and related equipment owned by Traylor Brothers, Inc.

BEST AVAI

["Traylor"], and injured Bernard Harris and other Traylor employees, who had been working on the pier at the time of the collision.

On March 22, 1989, the court granted Traylor's motion for summary judgment and dismissed the Jones Act and general maritime law claims of Bernard Harris and Robert Edward Boyd.

Thereafter Employers Fire Insurance Company ["Employers"] filed a motion for summary judgment seeking dismissal of Bernard Harris' remaining claim against Traylor for damages under 33 USC 905(b) of the Longshore and Harbor Worker's Compensation Act ["LHWCA"]. The motion was submitted to the court on a former date.

After considering the briefs of counsel and the applicable law, the court granted Employers' motion for summary judgment. The court now issues these supplemental written

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reasons for its decision to dismiss the 905(b) claim of Bernard Harris.

The depositions and affidavits submitted both in support of and in opposition to the Employers' motion provide the following information about Bernard Harris' employment with Traylor and his activities on the day of the accident.

Bernard began working for Traylor in September of 1984 as an iron worker on the Gramercy Mississippi River bridge project. After being laid off for approximately nine (9) days, he was rehired as a pile buck welder. His job was to weld plumb posts inside a caisson, a caisson being a series of interlocking steel sheets into which concrete can be poured to construct a pier.

A crew boat took Harris and the other welders to the crane barge each morning. The crane barge was a flat deck barge with no

engines or propellers. Besides the crane, the barge had bathroom facilities in a small building where the workers also changed clothes and drank coffee. The crane barge was moored by four anchors less than twelve feet from and connected to the caisson by a platform across which Harris walked. Harris would start up a welding machine, go down the ladder "in the hole" and start welding. Typically he would spend the majority of his time, about six hours a day, inside the caisson. He returned to the crane barge only for a coffee break and lunch. Sometimes he ate lunch on the crane barge; at other times he took a crew boat to the riverbank for lunch.

On the day of the accident, November 30, 1984, Harris arrived at the crane barge in the morning and put on rain gear because the bottom of the caisson was wet. He and a fellow welder entered the caisson by personnel basket

operated by the crane on the barge; the other welders remained on the crane barge to connect a set of gauges to air and gas bottles. Harris spent fifteen or twenty minutes in the hole, taking measurements for plates that were to be cut. He and his co-worker returned to the crane barge to rewrite the measurements on a piece of dry cardboard, before going to shore to cut the plates. By the time Harris found a piece of cardboard and began writing down the measurements, he saw the M/V CARGILL MacMILLAN approaching. He and the other welders put on life preservers and went to the downstream end of the crane barge. Just before the M/V CARGILL MacMILLAN struck the caisson, everyone on the crane barge jumped into the river.

In bringing this motion, the parties focused on whether or not the crane barge qualified as a vessel in navigation, under Kimble v. Traylor Bros., Inc., No. 88-3054

summary calendar (5th Cir. June 14, 1988) (unpublished), the theory being that if Traylor's work barge were not a vessel in navigation under the Jones Act and general maritime law, then it would not be a vessel in navigation under 905(b) of LHWCA. Richendollar v. Diamond M. Drilling Co., Inc., 819 F. 2d 124, 128 (5th Cir. 1987), cert. denied, ____ U.S. ____, 108 S. Ct. 331, 98 L. Ed. 2d 358; reh denied, ____ U.S. ____, 108 S. Ct. 736, 98 L. Ed. 2d 684 (1988); Davis v. Cargill, Inc., 808 F. 2d 361 (5th Cir. 1986).

Admittedly this Court is not dealing with the same Traylor barge as was involved in Kimble. However, under the test used by the Fifth Circuit in Kimble, this Court finds that this Traylor barge is also not a vessel in navigation. At pages 3 - 4 of its opinion, the Kimble court found three considerations relevant to the question of whether a work

barge qualified as a vessel in navigation:

> (1) whether the structure is constructed and used primarily as a work platform; (2) whether the structure was moored at the time of the accident; and (3) although capable of movement and sometimes moved across navigable waters in the course of normal operation, whether the transportation function performed by the structure is merely incidental to its primary purpose of serving as a work platform. Bernard v. Binnings Constr. Co., Inc., 741 F. 2d 824, 831 (5th Cir. 1984).

Applying those principles, this Court finds that Traylor barge N-49 is not a vessel in navigation for purposes of 905(b) of the LHWCA.

(1) The court finds the Barge N-49 was constructed and used primarily as a work platform. Although Barge N-49 had a small building with bathroom facilities where the men changed clothes and drank coffee, Harris himself characterized it as a flat deck barge with four anchors that did not move while he was there. [Harris affidavit of March 18, 1988; Harris Deposition at p. 110.] Later Harris

added that a small oven, navigational lights, an injured man basket, life saving equipment and bilge pumps were also on the barge. [Harris affidavit of May 3, 1989.] This is the only affidavit that refers to navigational lights on the barge itself. Harris' earlier affidavit and that of Benjamin Williams refer to navigational lights on the caisson. Even were there navigational lights on the barge itself, their presence alone is not indicative of a vessel in navigation. Kimble at p. 2. There is a difference between navigational lights and navigational equipment. There is no evidence that Barge N-49 had permanent navigational equipment, lifeboats, or crew quarters.

(2) The Court finds that Barge N-49 was moored at the time of the accident. [Boyd deposition, p. 122; Harris deposition p. 40.]

(3) The Court finds that Barge N-49's transportation function was merely incidental

to its primary purpose of serving as a work platform. The main evidence on the barge's transportation function came from Richard Boyd, the barge's crane operator. He stated that the crane barge was at Pier 2 when the project began in 1982-1983, and it was never used to carry materials or people from the bank to the pier. [Boyd deposition pp. 115 - 122.] However, because areas within the work site had varying demands for a crane, the barges moved around sometimes. [Boyd deposition p. 116.] Such movement, however, is consistent with the primary use of a barge as a work platform. Kimble at p. 2.

An affidavit by Thomas Youngblood, the project engineer at the bridge pier construction site, stated that the barge had never been moved from the Gramercy project site since its arrival. Boyd agreed at p. 116 of his deposition: "I think the only time when

they first started the pier [that] the crane barge wasn't there was when they were floating the caisson into place." At page 118 of that same deposition, Boyd said that the crane barge was moved to the bank to offload discs. Work orders attached to Youngblood's affidavit show, however, that it was Barge N-47, not Barge N-49, that was moved from the Gramercy site to the Kaiser dock to load equipment before the accident. Furthermore, even had Barge N-49 offloaded supplies, such a trip is not inconsistent with its being a work platform rather than a vessel in navigation. Kimble at page 2.

Three other instances of barge movement appear in Boyd's affidavit of May 3, 1989, submitted in opposition to this motion for summary judgment on the 905(b) claim.[1] None contradict the characterization of the Barge N-49 as a work platform.

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[1] I know that the crane barge N/601 (N-49) was towed to Ryan Walsh before the accident of November 20, 1984 in order to perform a job for a company not related to the bridge work. This job entailed unloading a grain barge because the barge was unable to be moved in the low water conditions at that time.

I know that after the accident of November 30, 1984 the crane barge was towed to Harvey, Louisiana, on a fourteen (14) hour trip in order to pick up a Manitowoc 4000W crane.

I know that I performed several jobs prior to the accident wherein the crane barge was towed to the location of different contractors along the Mississippi River in order to perform jobs. In return for this job performance, Traylor Brothers received favors from these contractors which included crawfish boils, fish frys, receiving lumber and gravel and many other goods and services. Boyd affidavit of May 3, 1989.

Towing Barge N-49 to Harvey to pick up a crane is compatible with transportation being an incidental function to the barge's primary purpose of serving as a work platform. Barge N-49 had to replace the Manitowoc crane which had toppled into the Mississippi River at the time of the accident. But for "before" and "prior to" the accident, no dates are given for the Ryan Walsh and other jobs along the Mississippi River. They could have been well before the Gramercy bridge project even began. Neither does Boyd identify the specific crane barge engaged in other contracting jobs along the Mississippi River. As proven by the work sheets attached to Youngblood's affidavit, Barge N-49 was not the only barge working the Gramercy bridge project.

"[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive

evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. at 2510.

In this case even with all justifiable inferences drawn in favor of the non-movant, there is no evidence that Barge N-49 was used other than as a work platform from the time that it moved onto the Gramercy bridge construction site. The fact that at some unspecified time before the accident the barge may have been used to unload a single grain barge is not a material fact which would defeat an otherwise properly brought motion for summary judgment. Compare Brunet v. Boh Bros. Constr. Co., Inc., 715 F. 2d 196 (5th Cir. 1983) [work platform moved to different construction sites within the Gulf four times

during the six months preceding the accident].

Accordingly, this Court grants Employers' motion for summary judgment dismissing the plaintiff Harris' 905(b) action because Barge N-49 was not a vessel in navigation under the Act.

Furthermore even were the Court to find that Barge N-49 was a vessel in navigation under the Act (which it does not), Employers is nonetheless entitled to have Harris' 905(b) claim dismissed because Harris was engaged in building a bridge and was not engaged in maritime employment at the time of this accident.

905(b) of the LHWCA provides in pertinent part: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel,...."

> In construing the coverage provisions of the Act, 33 USC 903(a), [the Fifth] circuit has identified three controlling jurisdictional requirements: (1) The injured claimant must have "employee" status as defined by 33 USC 902(3); (2) his injury must have occurred on the "navigable waters" situs described in 903(a); and (3) the claimant's employer must qualify as an "employer" within the meaning of 33 USC 902(4).[2] Alford v. American Bridge Div., U.S. Shell Corp., 642 F. 2d [807] at 810-11,] mod. in part, 655 F. 2d 86 (5th Cir.), mod., 668 F. 2d 791 (5th Cir. 1981), cert. denied, 455 U.S. 927, 102 S. Ct. 1292, 71 L. Ed. 2d 472 (1982)]; Hullinghorst Industries, Inc. v. Carroll, 650

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[2] The addition of an employee status requirement in the 1972 amendments has rendered the employer status requirement of the former Act "largely tautological." Hullinghorst Industries, Inc. v. Carroll, 650 F. 2d 750, 754 (5th Cir. 1981) If the injured claimant who must himself be engaged in maritime employment meets the status and situs requirements in 903(a) and 902(3), then his employer automatically qualifies as a statutory employer under 902(4); if the claimant fails to meet either of those requirements then the employer's qualifications under the Act are immaterial. Hullinghorst Industries, Inc., discussion in text at note 8, 650 F. 2d 758; Trott & Thompson v. Crawford, 631 F. 2d 1214, 1216 & n. 5 (5th Cir. 1980).

F. 2d 750, 754 (5th Cir. 1981), cert. denied, 454 U.S. 1163, 102 S. Ct. 1037, 71 L. Ed. 2d 319 (1982).

Thus a worker claiming under the Act must satisfy both a status and a situs test. Herb's Welding Inc. v. Gray, 470 U.S. 414, 415, 105, S. Ct. 1421, 1423, 84 L. Ed. 2d 406 (1985).

Bernard Harris met the situs requirement when he jumped into the Mississippi River. As a welder for the Gramercy bridge construction project however, Bernard Harris does not meet the status requirement of the LHWCA.

902(3) of the Act, 86 Stat. 1251, 33 U.S.C. 902(3) provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. (Emphasis added.)

The Act does not define the term "maritime

employment," and "[m]uch judicial ink has been applied in attempting to construe the scope of 'employee' status.'" Alford, 642 F. 2d at 811. See e.g. Hullinghorst Industries, Inc., supra [a carpenter was covered under the Act because he was involved in scaffolding work on a pier repair project involving a turntable used by longshoremen in loading and unloading of ships]; Trotti & Thompson v. Crawford, 631 F. 2d 1214 (5th Cir. 1980) [a land-based carpenter who was injured while constructing a pier[3] which was to be used in the loading and unloading of vessels was covered under the

[3] This case involves a different kind of pier from that at issue in Trotti. The pier in Trotti was for loading and unloading vessels; therefore work on its construction was related to the loading and unloading of vessels and within the ambit of LHWCA coverage. The pier in this case was for a bridge designed exclusively for vehicular traffic.

Act]; Odom Construction co., Inc. v. United States Department of Labor, 622 F. 2d 110 (5th Cir.), cert. denied 450 U.S. 966, 101 S. Ct. 1482, 67 L. Ed. 2d 614 (1980) [An employee injured while relocating fallen concrete blocks used for mooring barges and other vessels was covered because the job being performed clearly had a "realistically significant relationship to 'traditional activity involving navigation and commerce on navigable waters.'" 622 F. 2d at 113]; Ingalls Shipbuilding Corp. v. Morgan, 551 F. 2d 61, 62 (5th Cir.), cert. denied 434 U.S. 966, 98 S. Ct. 508, 54 L. Ed. 2d 453 (1977) [claimant was covered under the Act for injuries received while he was cleaning a steel plate that would later be used for construction or repair of ships].

The status requirement was added by Congress with the extension of the LHWCA shoreward in 1972. The status requirement

extends coverage to occupations beyond those specifically named by the statute. See Alabama Dry Dock & Shipbuilding Co. V. Kininess 554 F. 2d 176, 178 (5th Cir.), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 190 (1977) [repair and maintenance of machines used in shipbuilding is an essential aspect of the business]; Ingalls Shipbuilding Corp., supra. [There is no distinction between repair and construction of ships.]. It is equally true that "the legislative history indicates that Congress did not intend to "exclude other employees traditionally covered." Director, Etc. v. Perini North River Associates, 459 U.S. 297, 325, 103 S. Ct. 634, 651, 74 L. Ed. 2d 465 (1983) [To build the foundation of a sewage treatment plant that would extend over the Hudson River, caissons had to be placed in the river and filled with concrete. Churchill, a Perini employee who was in charge of all work

performed on the cargo barge, was on the deck giving directions to the crane operator unloading a caisson from a supply barge when a line used to keep the caissons in position snapped and struck him. Undoubtedly Churchill would have been covered by the LHWCA before 1972]; Boudreaux v. American Workover, Inc., 680 F. 2d 1034, 1054 (5th Cir. 1982), cert. denied, 459 U.S. 1170, 103 S. Ct. 815, 74 L. Ed. 2d 1014 (1983) [The 1972 Act did not "'diminish the traditional coverage of workers injured at work on navigable waters, who under the Act have been and are considered to be in 'maritime employment'"].

However, bridge workers were not unequivocally included within the perimeters of "maritime employment" before the Act's amendment in 1972.[4] See generally, Posevec v. Merritt Chapman and Scott Corp., 106 F. Supp. 170 (D.C. N.Y. 1951) [A watchman drowned when

[4] The Court is aware that the Fourth Circuit Court of Appeals looks at the "tortured history of employee coverage under the LHWCA" differently. LeMelle v. B.F. Diamond Construction Company, 674 F. 2d 296, 298 (4th Cir. 1982) [A concrete finisher, working over navigable waters on a bridge designed in part as an aid to navigation, was covered under the Act.]. However, this Court is not bound by the LeMelle decision and finds the Fifth Circuit case cited therein distinguishable. In Hardway Contracting Co. v. O'Keefe, 414 F. 2d 657 (5th Cir. 1968), the decedent was employed as a laborer on a bridge building project.

While loading diesel fuel tanks from one of his employer's vessels to another of his employer's vessels, the decedent slipped and fell from the vessel into the water and drowned. The decedent was loading/unloading a vessel at the time of his death and therefore unquestionably met the status requirement under LHWCA. Those facts are not present in this case; nor can they stand for thee wholesale proposition that bridge workers were covered under the Act before is 1972 amendment.

he was guarding a barge loaded with sand and gravel which was to be used to construct a bridge. While the bridge was an indirect aid to navigation and commerce, the work was basically local interest and not maritime in quality]; Massman Construction v. Bassett, 30 F. Supp. 813 (E.D. Mo.), rev'd on other grounds, 129 F. 2d 239 (8th Cir. 1940), cert. denied, 314 U.S. 648, 62 S. Ct. 92, 86 L. Ed. 520 (1941), and the cases cited therein at 30 F. Supp. 815 [an employee who worked for a contractor erecting a dam to create nine foot channel in Mississippi River and who was fatally injured while standing in the bottom of a cofferdam in the Mississippi River was not engaged in maritime employment]. But see Davis v. Department of Labor, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246 (1942) [Structural steel worker involved in dismantling an abandoned drawbridge drowned when he fell or was knocked

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admonition that not everyone on a covered situs automatically satisfies that status test." Herb's Welding, Id. at 425, 105 S. Ct. at 1428.

When Harris jumped into the Mississippi River, he had just taken measurements inside the caisson and was recopying those measurements on the Traylor barge, before returning to shore to cut the metal plates to those specifications. He was not engaged in shipbuilding or repair; he was not loading or unloading a vessel; nor were such activities ever required of him as a pile buck welder. The Court finds that Harris was not engaged in maritime employment at the time of his alleged injury; nor did his regular duties qualify him as an amphibious worker. Consequently and for these reasons, Harris does not meet the status test for an employee under 902(3); he is not a "person covered under [the LHWCA]" and he may not bring a 905(b) action against Traylor.

New Orleans, Louisiana, this 1st day of June, 1989.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE COMPLAINT OF CARGILL LEASING CORPORATION AS OWNER, AND CARGO CARRIERS, A DIVISION OF CARGILL MARINE & TERMINAL, INC. AS BAREBOAT CHARTERERS AND OWNERS PRO HAC VICE OF THE M/V/ CARGILL MACMILLAN, her engines, etc. FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NUMBER 84-5903 SECTION "L" (1)

CONSOLIDATED WITH NOS. 85-5684, 85-0440, 85-4517, 85-4714, 85-4919, 85-5522 85-5523, 85-5659 85-5703, 86-0075, 86-0934

J U D G M E N T

A motion for Summary Judgment seeking dismissal of the Jones Act and general maritime law claims of Bernard Harris and Robert Edward Boyd filed by Traylor Brothers, Inc. was heard on March 22, 1989. Present were the following:

1. Denise Vinet, representing Bernard Harris and Robert Edward Boyd
2. Bernard Harris
3. Robert Edward Boyd
4. Robert Redwine, representing Traylor Brothers, Inc.

Subsequently a Motion for Summary Judgment seeking dismissal of Bernard Harris' claims preserved under 33 U.S.C. 905(b) of the Longshore and Harborworker's Compensation Act, was brought by Employer's Fire Insurance Company and submitted to the court on the memoranda of counsel. The parties were represented as follows:

1. Joseph B. Guilbeau for Employer's Fire Insurance Company
2. Denise Vinet for Bernard Harris

Based on the court's review of the motions and memoranda filed, the arguments of counsel, the facts and applicable law;

APPENDIX D

In the Matter of the Complaint of CARGILL EQUIPMENT LEASING CORPORATION as owner, and CARGO CARRIERS, INC. and CARGILL EXPORT, INC., as bareboat charterers and owners pro hac vice, of the M/V CARGILL MACMILLAN, her engines, etc., for exoneration from or limitation of liability.

INTERVENTION	86-440, 85-4517,
Traylor Brothers, Inc.	85-4919, 85-4714,
Commercial Union	85-5523, 85-5659,
Insurance Co.	85-5703, 85-5522,
	85-75, 86-934

Wednesday, March 22, 1989

10:00 A.M.

MOTION OF TRAYLOR BROS., INC. FOR SUMMARY JUDGMENT DENYING THE OWNER OF THE M/V SPARTAN THE RIGHT TO LIMIT LIABILITY TO THE VALUE OF THE VESSEL.

ARGUED. DENIED AT THIS TIME.

MOTION OF TRAYLOR BROS. FOR SUMMARY JUDGMENT ON JONES ACT AND UNSEAWORTHINESS. MOTION GRANTED.

APPENDIX E

IN THE MATTER OF THE COMPLAINT CARGILL LEASING CORPORATION AS OWNER, AND CARGO CARRIERS, ETC., et al	CIVIL ACTION NUMBER 84-5903 C/W: 85-5684, 85-4517 85-4714, 85-5522 85-4919, 85-5523 85-5703, 85-0440, 85-5659, 86-934, 86-0075
	SECTION L (1)

This matter was submitted to the Court on a former date.

After considering the pleadings, the briefs of counsel and the applicable law:

IT IS ORDERED that motion of Employers Fire Insurance Company for summary judgment dismissing the 905(b) claim of Bernard Harris against Traylor Brothers, Inc. is GRANTED.

Written reasons to follow.

New Orleans, Louisiana this 11th day of May, 1989.

UNITED STATES DISTRICT JUDGE

APPENDIX F

556 SOUTHERN REPORTER, 2d SERIES
(pages 582 - 588)

Chester J. ORGERON, Jr. and his wife,
Connie E. Lynn Camus Orgeron

v.

AVONDALE SHIPYARDS, INC.

No. 89-C-1455.

Supreme Court of Louisiana

February 5, 1990.

Shipyard worker brought negligence action against owner of work barges. The Twenty-Fourth Judicial District Court, Parish of Jefferson, James L. Canella, J., entered judgment for owner, and the Court of Appeal, 542 So.2d 640, affirmed. The Supreme Court, Watson, J., held that work barges were "vessels" within meaning of Act.

Reversed and remanded.

1. Shipping - 84(1)

Worker's Compensation - 52

As humanitarian and remedial measure, Longshore and Harbor Workers' Compensation Act must be liberally construed. Longshore and Harbor Workers' Compensation Act, 1 et seq., as amended, 33 U.S.C.A. 901 et seq.

2. Seamen - 29(5.3)

Shipping - 84(1)

Longshore and Harbor Worker's Compensation Act and Jones Act furnish mutually exclusive remedies; Jones Act only applies to seamen who are members of vessel's crew, aid in its navigation, and have more or less permanent attachment to vessel or fleet of vessels, while recovery under LHWCA can be based upon transitory contact with vessel. Longshore and Harbor Workers' Compensation Act, 5(b), as amended, 33 U.S.C.A. 905(b); Jones Act, 46 U.S.C.A.App. 688.

3. Shipping - 84(1)

Injured workers have lesser recovery under

compensation remedy of Longshore and Harbor Workers' Compensation Act than seamen under negligence remedy of Jones Act; while seamen have right to maintenance and cure, liberal remedy afforded by Jones Act, and strict liability cause of action for unseaworthiness, remedy for unseaworthiness is unavailable to longshore and harbor workers; however, longshore or harbor worker may bring action against vessel owner as third party to recover damages for injury caused by negligence of vessel as well as claim for compensation against employer. Longshore and Harbor Workers' Compensation Act, 5(b), as amended, 33 U.S.C.A. 905(b); Jones Act, 46 U.S.C.A.App. 688.

4. Shipping - 84(3)

Warranty of seaworthiness only applies to vessels "in navigation," and injured worker must be engaged in traditional ship's work to

maintain cause of action for unseaworthiness.

5. Statutes - 223

In construing terms of Longshore and Harbor Workers' Compensation Act, other statutes having other purposes are of little aid. Longshore and Harbor Workers' Compensation Act, 1 et seq., as amended, 33 U.S.C.A. 901 et seq.

6. Shipping - 1

Under general maritime law's "capability test" for vessel status, "vessel" is every description of watercraft or other artificial contrivance used or capable of being used as means of transportation on water. 1 U.S.C.A. 3.

See publication Words and Phrases for other judicial constructions and definitions.

7. Admiralty - 11

Shipping - 1

Historically, ship construction is not regarded as traditional maritime activity --

ship under construction has not evolved into "vessel" status.

See publication Words and Phrases for other judicial constructions and definitions.

8. Shipping - 1

Barge is "vessel" within meaning of Longshore and Harbor Workers' Compensation Act even when it has no motive power. Longshore and Harbor Workers' Compensation Act, 5(b), as amended, 33 U.S.C.A. 905(b).

9. Shipping - 1

Test for "vessel" status under Longshore and Harbor Workers' Compensation Act is "modified capability test," i.e., there must be maritime situs and significant relationship to traditional maritime activity and structure must be sufficiently mobile to serve some transportation function. Longshore and Harbor Workers' Compensation Act, 5(b), as amended, 33 U.S.C.A. 905(b); 1 U.S.C.A. 3.

See publication Words and Phrases for other judicial constructions and definitions.

10. Shipping - 1, 84(1)

Floating work barges between which shipyard worker fell were "vessels" within meaning of Longshore and Harbor Workers' Compensation Act, and worker could maintain action against barge owner for negligence; barges were capable of transportation on water, albeit nonmotive, were floating on navigable water at time of accident, were being used for ship repair, and were frequently moved from place to place. Longshore and Harbor Workers' Compensation Act, 5(b), as amended, 33 U.S.C.A. 905(b); 1 U.S.C.A. 3.

See publication Words and Phrases for other judicial constructions and definitions.

Owen Bradley, Michael R. Guidry, Law Offices of Owen J. Bradley, Frederick W. Swaim,

Loyola Law School, New Orleans for applicant.

Patrick H. Patrick, Edward J. Koehl, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans for respondent.

WATSON, Justice.

In this claim for damages under the Longshore and Harbor Workers' Compensation Act (LHWCA), the threshold issue is whether the work barges on which plaintiff was injured qualify as vessels under the Act.[1]

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1. 33 U.S.C. 905(b) stated:
In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the

vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

The accident occurred on September 9, 1983 before the 1984 amendment to subsection (b) which eliminated a vessel negligence action against an employer under this section.

FACTS

On September 9, 1983, plaintiff, Chester J. Orgeron, Jr., was employed in ship repair at Avondale's Quick Repair Yard which is located on a slip fronting the Harvey Canal. The slip is dredged to a depth of twenty-five to twenty-seven feet. Both the slip and the canal are part of the Intracoastal Waterway, a navigable artery of commerce. Working at night, Orgeron fell into an opening between two barges or pontoons. He alleged negligence of Avondale or its vessels.

The pontoons were floating work platforms which also moved men and materials over the water comprising the slip of the Harvey Quick Repair Yard. Lance S. Bourgeois, Jr., the yard superintendent, an employee of Avondale for over forty years, testified that the pontoons/barges were all built in the Harvey Quick Repair Yard and designed to Avondale's

specifications. Bourgeois acknowledged that the pontoons transported workers' tools and equipment from place to place.[2]

Although their transportation function was incidental to their primary use, the barges had some design features not common to fixed, stationary platforms. They were free floating rather than permanently attached in one

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2. Q: But Mr. Bourgeois it's capable of carrying anchors and propellers around that yard and as a matter of fact, it does carry anchors?
A: Yes, it carries the repair work that we do.
Q: It carries heavy equipment around that yard; doesn't it?
A: No more than what it can handle on the wheel and rudders.
Q: Okay, but they were pretty heavy; aren't they?
A: Some of them may be eight, nine hundred pounds, maybe a ton.
Q: When these things move around the yard, Mr. Bourgeois, don't they have the workers' tools on them, sir?
A: They do have.
Q: These things are never permanently anchored in place; are they, sir?
A: Not permanently, no.
Tr. 296-97.

location; they were pulled or pushed where needed. Recessed valve bitts[3] on the corners of the barge-shaped pontoons were used when they were towed or moved or fastened together. The barges carried men wearing life vests as well as equipment.[4] They were subject to the perils of the sea, sometimes breaking loose from their moorings.

Just prior to his accident, Orgeron, a ship repairman, was working from one of Avondale's largest barges, which measured approximately sixty by twenty feet and had a two-foot draft. When Orgeron arrived at his

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3. "A single or double post of metal or wood fixed on the deck of a ship and around which mooring lines or other lines are made fast." Webster's Third New International Dictionary 223 (1976).

4. Q: Were life vests ever used by anyone on those barges?
A: You were always required to use life vest when you was on that pontoon and it was moving.
TR. 352.

job, the barge was abutting a smaller one. About four hours later, Orgeron took a heating torch from a co-worker and turned to hand it to another one. As he moved, he stepped into a gap which had opened between the barges, injuring his back.

The trial court concluded that plaintiff failed to carry his burden of proving that the structures on which he was working qualified as vessels under the Act. Because the plaintiff did not prove vessel status, the court did not consider negligence, causation or damages. The court of appeal affirmed[5] on the ground that the structures were work platforms, which incidentally performed some transportation functions. A writ was granted to consider the judgment of the court of appeal.[6]

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5. 542 So.2d 640 (La.App. 5 Cir.1989).

6. 550 So.2d 619 (La.1989).

LAW AND CONCLUSION

[1] The Longshore and Harbor Workers' Compensation Act provides compensation benefits to maritime employees for disability or death occurring on the navigable waters of the United States during the loading, unloading, repairing or building of a vessel.[7] Until passage of the LHWCA in 1927, this category of worker was frequently without a remedy. As a humanitarian and remedial measure, the LHWCA must be liberally construed. Director, OWCP v. Perini North River Association, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983).

[2] The LHWCA and the Jones Act[8] furnish mutually exclusive remedies. Swanson v. Marra Bros., 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1945). The Jones Act only applies to seamen

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7. 33 U.S.C. 903(a).

8. 46 U.S.C.App. 688.

who are members of a vessel's crew and aid in its navigation. Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957). A Jones Act seaman must have a more or less permanent attachment to a vessel or fleet of vessels[9], while recovery under Section 5(b) of the LHWCA can be based upon transitory contact with a vessel.

[3,4] Injured workers have a lesser recovery under the compensation remedy of the LHWCA than seamen have under the negligence action furnished by the Jones Act. Seamen have the right to maintenance and cure, the liberal remedy afforded by the Jones Act and a strict liability cause of action for unseaworthiness. The warranty of seaworthiness only applies to vessels "in navigation," and the injured worker must be engaged in traditional ship's work.

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9. Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986).

Under the 1972 amendments to the LHWCA, longshore and harbor workers no longer have a remedy for unseaworthiness. However, in addition to a compensation claim against his employer, a longshore or harbor worker may bring an action under 33 U.S.C. 905(b) against a vessel owner as a third party to recover damages for an injury caused by negligence of the vessel.[10]

[5] Ship repair is defined as maritime employment in the LHWCA. See Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). In construing the Act's terms, "other statutes having other purposes" are of little aid. South Chicago Coal & Dock v. Bassett, 309

10. In a negligence suit against a vessel under 33 U.S.C. 905(b), liability of the vessel is not "based upon the warranty of seaworthiness."

U.S. 251, 260, 60 S.Ct. 544, 549, 84 L.Ed. 732, 737 (1940). Thus the Jones Act[11] definition of the word vessel should not be substituted for the word vessel in Section 5(b) of the LHWCA.

[6] Under general maritime law, a vessel is "every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water."[12] This is the capability test for vessel status.

"Since Congress, in its use of the term 'vessel' in 902(21) and 905(b), did not provide a definition different from the generally acknowledged one found in section 3, we may presume, as other courts have, that it intended to adopt this commonly used term... [C]ases decided under the Jones Act, 46 U.S.C. 541-713

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11. 46 U.S.C.App. 688.

12. 1 U.S.C. 3.

(1976), have looked to a different test in determining what is a vessel for Jones Act purposes... A craft need not be actually engaged in navigation or commerce in order to come within the definition of 'vessel.' The question is one of residual capacity." McCarthy v. The Bark Peking, 716 F.2d 130, 134, 134 n. 2, 135 (2d Cir.1983), cert. denied, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984).

[7] After McCarthy, Judge Tate considered vessel status under Section 905(b) in Hall v. Hvide Hull No. 3, 746 F.2d 294 (5th Cir.1984), cert. denied, 474 U.S. 820, 106 S.Ct. 69, 88 L.Ed.2d 56 (1985). Hall held that an incomplete ship floating on navigable waters during its construction is a vessel for purposes of a tort action under Section 905(b). Hall followed Lundy v. Litton Systems, Inc., 624 F.2d 590 (5th Cir.1980), cert. denied, 450

U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981) and Burks v. American River Transportation Co., 679 F.2d 69 (5th Cir.1982).[13] Footnote 10 of Hall points out that the question of whether a vessel is also "in navigation" under the Jones Act is a different issue from the question of vessel status under Section 905(b).

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13. Hall distinguished Lowe v. Ingalls Shipbuilding, A Div. of Litton, 723 F.2d 1173 (5th Cir.1984) and Hollister v. Luke Construction Co., 517 F.2d 920 (5th Cir.1975), which did not involve Section 905(b) actions.

Following footnote 20 of Perini[14], Hall decided that the remedies of Act-covered employees injured on navigable waters were not affected by Executive Jet Aviation v. Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1952). Under Executive Jet,

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14. Footnote 29 of Perini states:
Perini cites our decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493 (1972), and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced. In that case, the only issue before the Court was whether federal admiralty jurisdiction extended to tort claims arising out of the crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." Id., at 266, 93 S.Ct., at 493, 34 L.Ed.2d at 454. Jurisdiction in Executive Jet was predicated on 28 U.S.C. 1331(1) [28 U.S.C.S 1333(1)], which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."

The explicit language of Executive Jet makes it clear that our discussion was occasioned by "the problems involved in

applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on open land, is wholly fortuitous." 409 U.S., at 265, 266, 93 S.Ct., at 503, 504, 34 L.Ed.2d, at 465, 466. Although the term "maritime" occurs both in 28 U.S.C. 1333(1) [28 U.S.C.S 1331(1)] and in 2(3) of the Act, these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1050 (CA5 1982) (footnote omitted). In addition, Churchill, as a marine construction worker, was by no means "fortuitously" on the water when he was injured. 459 U.S., at 320, 103 S.Ct., at 648-49, 74 L.Ed.2d, at 482-83.

there is admiralty jurisdiction only when a wrong occurs on navigable waters, situs, and bears a significant relationship to traditional maritime activity, nexus.[15] See Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). Historically, ship construction is not regarded as a traditional maritime activity: a ship under construction has not evolved into vessel status.

Richendollar v. Diamond M. Drilling Co., Inc., 819 F.2d 124 (5th Cir.), cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987) and Drake v. Raymark Indus., Inc., 772 F.2d 1007 (1st Cir.1985), cert. denied, 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986) held that a Section 905(b) cause of

15. As a result of Richendollar, Hall is no longer a reliable precedent with regard to jurisdiction. Molett v. Penrod Drilling Co., 872 F.2d 1221 (5th Cir.1989).

action must satisfy the Executive Jet requirements for admiralty jurisdiction. Richendollar, an en banc opinion from the Fifth Circuit authored by Judge Politz, decided that a ship being constructed on land was not a vessel within the admiralty jurisdiction of the federal courts because it was not in or on navigable waters and was incapable of flotation.

On its facts, Hall can be distinguished from Richendollar. The Hall hull was floating in navigable waters, and the Richendollar drilling rig was on land with holes in its hull. The Hall hull met the capability test: the Richendollar rig did not. Richendollar points out that the configuration of a watercraft is of secondary importance because size, form, equipment and means of propulsion do not determine jurisdiction.

After Richendollar, the Fifth Circuit

decided Rosetti v. Avondale Shipyards, Inc., 821 F.2d 1083 (5th Cir.1987), cert. denied, 484 U.S. 1008, 108 S.Ct. 703, 98 L.Ed.2d 654 (1988), which held that an unfinished vessel, floating but still under construction, was not a vessel for purposes of admiralty jurisdiction or Section 905(b), because it was incomplete and therefore incapable of navigation or its special purpose use on or in the water. Rosetti and Hall cannot be reconciled: the companion cases both involved floating hulls which were still under construction.

Richendollar and Drake rejected Hall's treatment of the Executive Jet jurisdictional issue. However, that debatable question is not decisive here.[16] Richendollar and Rosetti do not control this issue of vessel status,

16. Since ship construction is defined as maritime employment in the LHWCA, it is questionable whether the traditional view that ship construction is not a subject of maritime jurisdiction should apply to any part of the Act. See Perini and Hall.

because the barges on which Orgeron was working were not under construction. They were finished products used in the construction of other vessels. The barges were capable of navigation, were afloat on navigable waters and performed a transportation function. Orgeron himself was engaged in ship repair, which has generally been regarded as a traditional maritime activity.

Ducrepont v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393 (5th Cir.1989) considered vessel status separately under the Jones Act and Section 5(b) of the LHWCA, because the term vessel in the LHWCA is not synonymous with the term vessel in the Jones Act. The structure at issue in Ducrepont was a cargo barge which had been converted into a stationary work platform and, like the platform in Davis v. Cargill, Inc., 808 F.2d 361 (5th Cir.1986), was analogized to a dry dock. The

Davis platform was permanently moored, anchored to the riverbed and equipped with a permanently attached landing extension.

In affirming the trial court, the court of appeal here relied on language in Bernard v. Binnings Construction Company, Inc., 741 F.2d 824 (5th Cir.1984), which stated that the work platform at issue was moored at the time of the accident; and any transportation function it performed was merely incidental to its primary purpose of serving as a work platform. The court of appeal failed to note that this language was used in the analysis of a barge as a Jones Act vessel and not as a Section 905(b) vessel. The issue of whether the barge performed a transportation function as a primary or incidental matter relates to vessel status under the Jones Act.[17]

17. 877 F.2d 395.

[8] Ducrepont held that a barge is not a 905(b) vessel when it is firmly moored, seldom moved, not used for navigation and in use as a dry dock or stationary work platform. However, a barge is a vessel within the meaning of the LHWCA even when it has no motive power. Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931, 1944 AMC 337 (1944); The Robert W. Parsons, 191 U.S. 17, 30, 24 S.Ct. 8, 48 L.Ed. 73 (1903); Ellis v. United States, 206 U.S. 246, 27 S.Ct. 600, 51 L.Ed. 1047 (1907). The fact that these barges were pushed or pulled into various locations rather than self-propelled does not remove them from the category of 905(b) vessels. Richendollar.

[9, 10] In the Fifth Circuit, the test for vessel status under Section 5(b) of the LHWCA is the capability test in 1 U.S.C. 3, as modified by Richendollar and Rosetti hold that a Section 905(b) vessel must satisfy the

Executive Jet requirements for admiralty jurisdiction, a maritime situs and a significant relationship to traditional maritime activity. Ducrepont requires that a structure be sufficiently mobile to serve some transportation function for vessel status under Section 905(b).

The barges being used as work platforms by Orgeron and his co-workers were capable of transportation on water and they were floating on navigable water. The situs test is met because Orgeron's accident occurred both on and in navigable water. The nexus test is met because the barges were being used for ship repair, a traditional maritime activity classified as maritime employment by the LHWCA. The barges have vessel status because they were used for transportation on navigable waters.

In Ducrepont, the stationary work platform was firmly moored and seldom moved. These

barges were not stationary and were frequently moved. In fact, the injury occurred when the barges drifted apart. Avondale's barges meet the capability standard of 1 U.S.C. 3. Additionally, they were designed and used for transportation as well as work platforms.

The trial court erred in concluding that these pontoons/barges were not vessels. They meet the statutory standard. They were clearly capable of transportation and moved periodically around the stretch of navigable water fronting the Harvey Quick Repair Yard. They performed a transportation function.

Since the trial court did not reach the issues of negligence, causation and damages, the case is remanded to the court of appeal for consideration of those questions on the record.

For the foregoing reasons, the judgment of the court of appeal is reversed and the case is remanded for further proceedings consistent

with this opinion.

REVERSED AND REMANDED.

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE COMPLAINT OF CARGILL LEASING CORPORATION AS OWNER, AND CARGO CARRIERS, A DIVISION OF CARGILL MARINE & TERMINAL, INC., AS BAREBOAT CHARTERERS AND OWNERS PRO HAC VICE OF THE M/V CARGILL MACMILLAN, her engines, etc., FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NUMBER: 84-5903 SECTION "L" (1) CONSOLIDATED WITH: NOS.: 85-5684, 85-0440, 85-4517, 85,4714, 85,4919, 85,5522, 85,5523, 85,5659, 85,5703, 86-0075, 86-0934

AFFIDAVIT OF ROBERT BOYD

Before me, the undersigned authority, came and appeared:

ROBERT E. BOYD

who being by me first duly sworn, deposed as follows:

1.

From approximately November of 1981 through April of 1985 I was employed by Traylor

Brothers, Inc. as a laborer and then a heavy equipment operator and in that capacity, I have personal knowledge of the facts set forth herein.

2.

I worked as a heavy equipment operator on Barge N/601 (N-49) as the crane operator.

3.

I know that the crane barge N/601 (N-49) was towed to Ryan Walsh before the accident of November 30, 1984 in order to perform a job for a company not related to the bridge work. This job entailed unloading a grain barge because the barge was unable to be moved in the low water conditions at that time.

4.

I know that after the accident of November 30, 1984 the crane barge was towed to Harvey, Louisiana on a fourteen (14) hour trip in order to pick up a Manitowoc 4000W crane.

5.

I know that I performed several jobs prior to the accident wherein the crane barge was towed to the location of different contractors along the Mississippi River in order to perform jobs. In return for this job performance, Traylor Brothers received favors from these contractors which included crawfish boils, fish frys, receiving lumber and gravel and many other goods and services.

6.

Prior to this accident I was in fear of being hit by vessels in barges in tow on at least three occasions. The barge sustained at least one bump prior to the accident.

7.

There was no means of communication to the workers inside of the caisson nor was there a means of communication aboard the crane barge before and after the accident.

8.

There was no safety boat provided to the workers on the crane barge before or after the accident.

9.

The crane barge contained a 3900 Manitowoc crane and was approximately 60 feet wide by 120 feet long. It contained a small building which was used to store tools, change clothes, drink coffee, get out of the weather and eat lunch. It also provided the men with a little oven to heat their lunch if they so desired. The crane barge also contained bathroom facilities. Most of the time we were required to stay on the barge all day. The barge was equipped with navigational lights and had an injured man emergency basket and life saving ring aboard. The barge was raked and had bilge pumps aboard.

10.

The crane barge contained four anchors

which were used to hold the barge in place at the job site. The barge swayed constantly because of the wave action from oncoming traffic in the Mississippi River.

11.

My job responsibilities included operating the crane, keeping the barge clean, fueling the crane, generators and welding machines and assisting in anchoring the barge.

I make these statements on my own personal knowledge and I am competent to testify to the matters stated above.

WITNESSES:

_____ _____

ROBERT E. BOYD

_____

SWORN TO AND SUBSCRIBED, before me, Notary, this 3rd day of May, 1989.

_____

Notary Public

APPENDIX H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE COMPLAINT OF CARGILL LEASING CORPORATION AS OWNER, AND CARGO CARRIERS, A DIVISION OF CARGILL MARINE & TERMINAL, INC., AS BAREBOAT CHARTERERS AND OWNERS PRO HAC VICE OF THE M/V CARGILL MACMILLAN, her engines, etc., FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NUMBER: 84-5903 SECTION "L" (1) CONSOLIDATED WITH: NOS.: 85-5684, 85-0440, 85-4517, 85,4714, 85,4919, 85,5522, 85,5523, 85,5659, 85,5703, 86-0075, 86-0934

AFFIDAVIT OF BERNARD HARRIS

Before me, the undersigned authority came and appeared:

BERNARD HARRIS

who being by me first duly sworn, deposed as follows:

1.

In September, 1984 I was employed as an iron worker for Traylor Brothers, Inc. on the

Gramercy bridge project, Mississippi River.

2.

I was laid off for approximately nine (9) days and was assigned a new job as a pile buck welder.

3.

I performed most of my tasks aboard the crane barge and I spent a total of 6 hours in the caisson during my new work assignment as pile buck welder.

4.

Prior to being hired as a pile buck welder I was classified as an iron worker earning $12.50 per hour. My new work assignment as a pile buck welder paid me $14.00 per hour.

5.

I was performing a substantial part of my work aboard the crane barge and I was continuously subject to the perils of the Mississippi River in that I was in constant

fear of being hit by barges in tow.

6.

Prior to this accident, I was put in fear of being hit by vessels and barges in tow on at least three occasions. It is my understanding that the United States Coast Guard was notified about these frequent close calls.

7.

The crane barge contained a small building used by we crew members to change clothes and drink coffee. It also contained a small oven for the men to heat their lunches if they so desired. The crane barge also contained bathroom facilities, navigational lights, life saving equipment, injured man basket, bilge pumps, and 4 anchors.

8.

The crane barge was secured to the bottom of the Mississippi River by 4 anchors. The barge swayed constantly because of wave action.

9.

There was no means of communication for the workers inside of the caisson; nor was there means of communication aboard the crane barge on the day of the accident. The barge did not contain a safety boat for emergency situations.

10.

I was required to eat lunch aboard the barge most of the time.

11.

I make these statements from my own personal knowledge and I am competent to testify to the matters stated above.

WITNESSES:

_____ _____

BERNARD HARRIS

_____

SWORN TO AND SUBSCRIBED, before me, Notary, this 3rd day of May, 1989.

_____

Notary Public

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE COMPLAINT OF CARGILL LEASING CORPORATION AS OWNER, AND CARGO CARRIERS, A DIVISION OF CARGILL MARINE & TERMINAL, INC., AS BAREBOAT CHARTERERS AND OWNERS PRO HAC VICE OF THE M/V CARGILL MACMILLAN, her engines, etc., FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NUMBER: 84-5903 SECTION "L" (1) CONSOLIDATED WITH: NOS.: 85-5684, 85-0440, 85-4517, 85,4714, 85,4919, 85,5522, 85,5523, 85,5659, 85,5703, 86-0075, 86-0934

AFFIDAVIT OF BERNARD HARRIS

I, Bernard Harris, former employee of Traylor Brothers, Inc., do hereby swear and depose and say that:

1.

In September, 1984 I was employed as an iron worker for Traylor Brothers, Inc. on the Gramercy bridge project, Mississippi River.

2.

I was laid off for approximately nine (9) days and was assigned a new job as a pile buck welder.

3.

I was required to perform the following work tasks as a pile buck welder:

a. Weld pipes together aboard the crane barge in order to place them in the caisson where they supported the subpumps to discharge water. This task could take as long as three to seven days.

b. Rigging covers - the purpose of the covers was to give the caisson a good foundation and to pour concrete over them. Each cover weighed approximately 22 tons. I was required to secure a sling on to the covers and signal the crane operator on the barge to lift the covers and place them into the caisson hole.

c. I was required to drive pilings -

this task included the rigging of pilings and assisting in the placement of them. The rig barge was moved to a location adjacent to the Kaiser Plant in the river.

d. Fabrication - The vast majority of my time was spent aboard the crane barge cutting angle iron which was later placed inside the caisson.

e. Maintaining the crane barge - I was required to do all necessary work on the crane barge which included patching the barge.

f. I was required to set the anchors on the crane barge.

g. I was required to unload all material from the barges.

4.

I performed most of my tasks aboard the crane barge and I spent a total of 6 hours in the caisson during my new work assignment as pile buck welder.

5.

Prior to being hired as a pile buck welder I was classified as an iron worker earning $12.50 per hour. My new work assignment as a pile buck welder paid me $14.00 per hour.

6.

I was performing a substantial part of my work aboard the crane barge and I was continuously subject to the perils of the Mississippi River in that I was in constant fear of being hit by barges in tow.

7.

Prior to this accident, I was put in fear of being hit by vessels and barges in tow on at least three occasions. It is my understanding that the United States Coast Guard was notified about these frequent close calls.

8.

The crane barge contained a small building used by we crew members to change clothes,

drink coffee. The crane barge also contained bathroom facilities.

9.

On several occasions, the crane barges were transported from the situs of the accident to other locations for me to perform other activities such as pile driving and unloading materials.

10.

The caisson was not a permanent structure attached to the floor of the Mississippi River. A series of interlocking steel sheets were floated out to the job site and were constructed in such a way as to form a protective shield. It was surrounded by the waters of the Mississippi River and could be easily collapsed if hit by heavy moving objects or by the crane barge (my work place) if it rubbed against it.

11.

The caisson constantly leaked water and it was necessary to pump out this temporary structure twenty-four hours a day.

12.

There was no means of communication for the workers inside of the caisson; nor was there a means of communication aboard the crane barge on the day of the accident.

13.

The caisson was equipped with navigation lights.

14.

The caisson was c. ninety feet deep.

15.

I make these statements from my own personal knowledge and I am competent to testify to the matters stated above.

WITNESSES:

_____ _____

BERNARD HARRIS

_____

SWORN TO AND SUBSCRIBED, before me, Notary, this 18 day of March, 1988.

_____

Notary Public

APPENDIX J

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE COMPLAINT OF CARGILL LEASING CORPORATION AS OWNER, AND CARGO CARRIERS, A DIVISION OF CARGILL MARINE & TERMINAL, INC., AS BAREBOAT CHARTERERS AND OWNERS PRO HAC VICE OF THE M/V CARGILL MACMILLAN, her engines, etc., FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NUMBER: 84-5903 SECTION "L" (1) CONSOLIDATED WITH: NOS.: 85-5684, 85-0440, 85-4517, 85,4714, 85,4919, 85,5522, 85,5523, 85,5659, 85,5703, 86-0075, 86-0934

AFFIDAVIT OF ROBERT BOYD

I, Robert Boyd, former employee of Traylor Brothers, Inc., do hereby swear, depose and say that:

1.

I worked full time on the barge in question as the crane operator.

2.

In that job I was mostly ten (10) to

fifteen (15) feet above the barge deck.

3.

I could see all of the operations being carried out each day.

4.

I adopt the contents of the affidavits of Bernard Harris and Benjamin E. Williams in their entirety.

WITNESSES:

_____ _____

ROBERT BOYD

_____

SWORN TO AND SUBSCRIBED, before me, Notary, this 18 day of March, 1988.

_____

Notary Public

APPENDIX K

DEPOSITION OF ROBERT BOYD

where you sat when you operated the crane?

A. Yes, sir.

Q. Is that generally where you spent most of your day.

A. Yes, sir.

Q. Sitting in that seat operating the crane?

A. Right.

Q. Was anybody designated as a flagman?

A. Yes, sir.

Q. Who was that?

A. At the time I believe he was Wayne Legget was my flagman.

Q. And he had other duties besides being your flagman?

A. Yes. He was also a pile buck welder.

Q. Did you have a radio in your cab.

A. No, sir.

Q. Was there --

A. We had CBs on all the rigs, but they got stolen. You know, they would walk off the job. They got costly and they quit putting them in.

Q. There wasn't a company radio?

A. No, sir.

Q. Was there any communication between the crane barge and the office, or any place else?

A. Yes, sir.

Q. And how was that communication?

A. Mr. Walker, he was the foreman, and he had a radio.

Q. He had a radio that he clipped on his belt?

A. Yes, sir.

Q. When Walker wasn't on the crane barge, you had no communication with the rest of the world?

A. Sure didn't. We was out there, sitting ducks that morning.

Q. Did Traylor Brothers make any provisions for an emergency situation when Mr. Walker or somebody with a radio wasn't present on the crane barge? In other words, did you --

A. Common sense, more than anything.

Q. In other words, if Mr. Walker is not out there with his radio, and you all have a problem, let's say a man gets injured, how were you supposed to let the office know that you needed help?

A. More than likely, I would blow the horn on the crane for about a minute or two straight, and somebody on the job would hear and know something was going on.

Q. So the only way you had of signaling the office when Mr. Walker wasn't out there with his radio was blowing with, blowing your horn?

A. Yes, sir.

Q. Had you ever had an occasion to do that?

A. Yes, sir.

Q. What were the circumstances?

A. One day, one of the foremen was out there, and all the men were down in the hole, and he was, I was up in the crane, and he was down rigging up some angle iron to go in the hole.

As we were getting ready to hook up to it, boat passed and made some waves on the side of the pier.

And the load that we was fixing to pick up fell over on his foot. And it was just me and him there, you know, so --

Q. He was down in the hole.

A. He was on top of the crane barge at the time.

I could not get in touch with nobody there because he was down there, I was up here, and the boat was gone. So blew the horn on the crane a few times, and, you know, nobody -- somebody came finally, but it was after awhile.

Q. About how long did it take.

A. About ten minutes, I guess.

Q. Was the man hurt bad?

A. I think he crushed his foot or something. It wasn't -- crushed as far as broke, I am not for sure. I don't remember that.

Q. Was there any other occasion that you needed assistance that you had to blow your horn to get it?

A. Not really, no. Just that morning of the accident.

Q. When you say the morning of the accident, you are talking about the accident that we are here discussing today.

A. Yes, sir.

Q. I am talking about prior to that.

A. We have had close calls all the time. You learn to live with that.

Q. I will get to that.

I am talking about, I am particularly interested in situations where there was an accident or some kind of an emergency on the crane barge, or at the Pier 2 location, where you needed to summon help and a man with a radio wasn't out there.

warning system.

A. Yes. If you call it that.

Q. That warning system consisted of a whistle that somehow got tripped?

A. Somebody had to go up there and flip it.

Q. Was there somebody who was --

A. No, sir.

Q. -- designated as a watchman or something?

A. No, sir. They wouldn't do it. They said it cost too much money.

Q. But they gave you some kind of boat or something that was standing by.

A. Most most of the time they tried to have one, but, yes, tried to have one. Because that state boat, I would drive it out there myself, and I figured if they wanted it they would get it. I wasn't going to be out there no more.

Q. They didn't leave you a boat before the accident?

A. No, sir. Our foreman had the boat on the other side of the river.

Q. Was it generally the case that there was not a boat tied up to the crane barge when you all were out there working, before your accident.

A. They usually had a boat there. It was just a freak accident that there was no boat, I guess.

Because the tugboat, see, he waits on you. You got to work out there all the time. They were usually waiting for you to move a barge in or something. And sets out in the middle waiting on you.

At dinner time and stuff all the bosses and whatnot go. They had a roach coach come out to the bank sometimes with the hot meals and stuff. They had a roach coach come to the

bank.

Q. I understand there was no radio communication between the crane barge and the office?

A. No, sir.

rain gear and went down in the hole?

A. Right.

Q. And you got down in the hole about what time?

A. Okay, let's back up a minute.

Q. Okay.

A. We went down with the rig, okay?

A. Yes.

A. It's a skip bucket. That's what you call it, man basket, whatever you want to call it.

Q. You and Brian.

A. Right.

Q. And the remaining welders were on the crane barge?

A. Yes. They were up putting a set of gauges on the air and gas bottles up there. We had one come by pretty close and tip the

bottles over and broke the gauges. They were down on the other end of the crane barge. I didn't know anything about it.

Q. You said you had one come by pretty close and tipped the bottles over?

A. Yes.

Q. One what?

A. Boat.

Q. When did that occur?

A. A couple of days ago, before that.

Q. And his --

A. His waves.

Q. His wake from the passing boat had rocked the crane barge sufficiently to tip the air and gas bottles over?

A. Right.

Q. Had that ever happened before while you were working as a welder?

A. Out there?

Q. Yes.

A. Well, we have had two near misses before we got hit.

Q. In the two weeks that you were working?

A. Yes.

Q. Tell me about the first one of those.

A. I don't know the name of the boat or anything. He just come by close and --

Q. Sure.

A. -- I don't remember what day it was. It was within that last week.

Q. It was sometime between Monday and Friday of the last week?

A. Yes. But it, we could have had one say like Friday of the week before, see. I wasn't too sure.

They said they notified the Coast Guard, that they were, I guess Traylor Brothers notified them that they were coming a little bit too close. They are actually supposed to stay a hundred feet from the crane barge or the

caisson.

Q. Who told you Traylor Brothers had notified the Coast Guard about this near miss?

A. I heard it through word of mouth.

Q. You didn't hear it from Walker or anybody?

A. No. I think Bennie Williams mentioned it. I mean don't quote me, because I am not too sure.

Q. I just want to know what you remember, Mr. Harris.

A. Okay.

Q. Were you on the crane barge when that first near miss occurred?

A. I think I was, yes. Yes.

Q. Tell me what you remember about that.

A. It was just a big ship to come by and just, you know, just threw a heck of a wake on me. And rocked me back and forth, then the bottles went over, and they broke there.

Q. Was it an ocean-going vessel?

A. I think it was. It was coming downstream.

Q. From Baton Rouge?

A. Right.

Q. As it approached the caisson and the crane barge, which side was it going to pass on, or which side did it pass on?

A. On the 1250 lane.

Q. In other words, it passed on the east bank side.

A. Yes.

Q. About how far from the caisson did it pass, if you understand what I mean.

A. I would say probably 50 feet.

Q. And you were standing on the crane barge when this happened?

A. Yes.

Q. Was the wash from that vessel sufficient to make you worry that you might get knocked

off?

A. No.

Q. It was just enough to knock over some bottles?

A. Yes. It was just big swells.

Q. Tell me about the second near miss.

A. That happened on the west side.

Q. Tell me about that.

A. We brought in another rig to set the, down in the bottom, we had big covers, and weighed 22 ton. We brought another rig in, moored it off, you know, on a crane barge, and he come close on the other side.

Q. When you say he, who are you talking about?

A. I don't know.

Q. Is it a tugboat.

A. Yes. He had a tow.

Q. And he was downbound, too?

A. Yes.

Q. And he passed the caisson on the west bank side?

A. Right.

Q. About how many barges did he have in tow, do you remember?

A. I would say six. Roughly, I mean.

Q. I understand.

A. You don't pay no attention until they hit. That's when you really get excited.

Q. You were on the crane barge when this occurred?

A. Yes.

Q. About what time of the morning was it?

A. I would say probably it was in the afternoon. Probably around 2:00 o'clock.

Q. Do you remember what day of the week it was?

A. No.

Q. Was it the day before your accident.

A. No. It was earlier in the week. Let's

see, okay, I could give you a pretty close day.

It would probably have been, let's see, I am not too sure, but I would say it was probably Monday.

Q. About how close did he come to the caisson?

A. He come about eight foot from the crane barge. Now the caisson, see we had --

Q. The crane barge was between the caisson and the tow.

A. Right. We had crane barge, two rigs out there. And he come about six foot.

Q. Six foot --

A. From the crane barge on the west side. Don't try and pinpoint me on the days. I don't pay any attention on days.

Q. I just want to know what you remember.

A. Okay.

Q. What happened when that tug and its tow passed?

A. Nothing happened.

Q. I am sorry, I thought you told me it knocked some bottles over.

A. No.

Q. That was the occasion where the big boat --

A. Yes.

Q. So when this tug and tow came within six feet of the rig, it didn't cause any damage?

A. No.

Q. Did you mention this incident to anybody when it occurred?

A. What do you mean, this -- Bennie and I was out there.

Q. Did you say anything about it to Walker or anybody with management?

A. No.

Q. Was this something that was unusual?

A. It was unusual. There isn't much you can do about it. They are going down the

river, what are you going to do. You didn't think about getting no numbers or name or anything off of it.

When you are out there and something like that happens, when they go by you, don't worry about them, you know what I mean. Just when they whack you, that's the ones you are worrying about.

Q. Did you often see tugs with barges in tow passing the caisson downbound on the west bank side?

A. Yes. I seen quite a few. But they ain't never towing a big tow. They might have six barges or something like that.

Q. Let's go back to the morning of the accident, Mr. Harris. You told me that you and Brian Doucet got your rain gear to get ready to go down in the hole and do your work while the rest of the crew was preparing bottles on the crane barge.

A. Right.

Q. Did you and Brian actually go down in the hole?

A. Yes, sir.

Q. And how long did you spend in the hole?

A. 15, 20 minutes.

Q. Then you came back on to the deck of the crane barge?

A. Right.

Q. What did you do?

A. Well, it was so wet down there, see I had wrote all the measurements down on the skip, on the man cage; and we got all the measurements, but there was one that was up on the northwest corner, and I told Brian, I says, you want to get this while we are down here.

He said heck, it is too wet down here, we will just go back up there, go back up.

I wrote all the measurements down on the crane, on the cage.

We went back up there and Robert set us up on the, to be the -- it would be the far end of the, upstream end of the crane barge, he set the skip box up there.

So then Brian went down to the other end to see how them other guys was making out, and I got a piece of cardboard and I was rewriting the measurements down, because we were going to go to shore and cut the plate.

Q. I tell you what I want you to do for me, Mr. Harris. I want you to draw me a picture of the caisson, the crane barge and anything else that you had out there that morning.

First draw both banks of the river for me.

A. (Witness complies.)

Q. Don't you have indicated that the caisson was 750 feet from the west bank and 1250 feet from the east bank.

A. Right.

Q. You have drawn a circle, now, is that the caisson?

A. Caisson.

Q. Why don't you write caisson down here and draw an arrow pointing to the circle?

A. (Witness complies.)

Q. And the rectangle you have drawn next to the circle is what?

A. That's the barge.

Q. Why don't you write crane barge -- don't write in there, because I am going to ask you to do something else.

Was there anything else out there, other than the crane barge?

A. No. I mean down here on this end was like a platform.

Q. Draw that.

A. The diesel engines was setting down here. It was connected to --

Q. To the caisson. Write platform out here

if you would.

A. (Witness complies.)

Q. When you and Mr. Doucet came back up on to the crane barge, where was the work boat?

A. What?

Q. I am sorry, where was the crewboat.

A. Right over here.

Q. It was tied alongside the crane barge?

A. Yes.

Q. Did it remain there throughout this incident, or did the crewboat leave at some point before the accident happened?

A. They left. I didn't even know it was gone.

Q. Who took it?

A. Walker.

Q. You and Mr. Doucet came back out of the caisson and, let's see, who was the operator, Mr. Boyd. Mr. Boyd told you to do what?

A. Mr. Boyd didn't tell me to do anything.

Q. I thought you said Robert put you somewhere?

A. Robert set me up, the rig was setting in here.

Q. Why don't you label that rig. And Robert set you up where?

A. Sent me up here on the upstream end. The rig was sitting here, and he set me right up here.

Q. When you say he set you up, explain that to me.

A. He took me up out of the hole, then he set me up on the upstream end of the crane barge.

Q. You came out of the hole in a personnel basket.

A. Right.

Q. And he sent you down on the upstream end of the crane barge?

A. Right.

Q. And you --

A. Brian.

Q. -- Mr. Doucet.

A. Right.

Q. He set you down, and then what happened?

A. Well, I got a piece of paper and I started writing down the measurements.

Q. You got out of the personnel basket.

A. Right.

Q. What did he do with the personnel basket.

A. Just sat there.

Q. And you started writing down the measurements?

A. Yes. That I had wrote down on top of the personnel basket.

Q. Then what happened?

A. I was rewriting them.

Q. What happened, keep going.

A. Well, I looked upstream.

Q. What did you see?

A. Cargill.

Q. Tell me exactly what the first thing was that you saw?

A. He was coming down the river, to me it looked like he was getting sideways. And the, till today, I have run it through my mind millions and millions of times, why did he ever take the 750 instead of the 1250.

Q. You say it looked like he was getting sideways.

A. Yes. Like he was making a turn to go in --

Q. To go in --

A. -- to the 750 lane.

Q. Towards the west bank.

A. Right.

Q. About how far away was the head of his tow from where you were standing when you first saw him?

A. I could not give it to you in feet.

I would say that I had a good feeling that he was going to hit me ten minutes before he hit us. Could I ask a question here?

Q. It depends. Generally the way this works is I ask the questions.

A. Something that has bothered me ever since the day of the accident.

(Off the record discussion.).

BY MR. BRECKINRIDGE:

Q. When you first got the feeling that the tow was going to hit the crane barge, did you do anything or did you just continue working?

A. I kept continuing on writing and watching.

Q. Did you also start looking for the crewboat?

A. Yes, I did. I looked; it was gone.

Q. It was, okay, when you first realized, or had a feeling that the tow was going to hit

you, you looked and the crewboat was gone?

A. Yes.

Q. Do you know where it was? I mean could you see it off anywhere?

A. I could not see it.

Q. Did y'all have a radio on the crane barge?

A. No communications at all.

Q. No company radio?

A. No.

Q. Nothing.

A. No.

Q. How did you communicate with the office?

A. Operator?

Q. No, with the office.

A. Walker had a radio.

Q. On the crewboat?

A. No. He had a walkie-talkie on his hip.

Q. On his belt?

A. Yes.

Q. So when Walker was off the crane barge, you had no communication with anybody?